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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

Fifty-third session

SUMMARY RECORD OF THE 14th MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 9 August 2001, at 10 a.m.

Chairperson: Mr. WEISSBRODT

later: Mr. PARK
(Vice-Chairperson)

later: Mr. WEISSBRODT
(Chairperson)

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The meeting was called to order at 10.05 a.m.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 4) (continued) (E/CN.4/Sub.2/2001/10, 11 and Add.1, 12 and Add.1, 13, 14 and 33; E/CN.4/Sub.2/2001/NGO/3, 11, 17, 18, 19, 20, 21 and 22; E/CN.4/Sub.2/2001/CRP.1; E/CN.4/Sub.2/2001/WG.2/WP.1 and Add.1-3; E/CN.4//2001/51-53, 54 and Add.1 and Corr.1, 62/Add.2 and 148; E/CN.4/Sub.2/2000/12 and 13)

1. Mr. IBARRA (International Indian Treaty Council) expressed his organization's support for Sub-Commission resolution 2000/8, proposing a detailed study into the right to drinking water and sanitation which, unfortunately, had not been approved by the Commission on Human Rights. Despite the geopolitical problems concerning the world's water resources, the right to life of peoples and communities that depended on those resources for survival had to be protected. He thus urged the Sub-Commission to reiterate to the Commission the importance of its resolution 2000/8.

2. The recent negotiations in Bonn on the subject of the Kyoto Protocol to the United Nations Framework Convention on Climate Change had increased the concern of the indigenous peoples with regard to the growing discrepancy between those instruments and the United Nations instruments relating to development, the environment, human rights and fundamental freedoms.

3. The Kyoto Protocol neither gave priority to the protection of the rainforests, nor did it refer to the contribution made by indigenous peoples and communities. For many indigenous peoples, the protection of the rainforests was crucial to their survival. Indigenous peoples were affected more than anyone else by climate change, since they often lived in the most fragile ecosystems. He urged the Sub-Commission to adopt a resolution reaffirming the rights already acquired by indigenous peoples in international instruments and emphasizing the need to take into account their contribution to the protection of ecosystems and biodiversity. The Sub-Commission should also support the efforts of the indigenous peoples to acquire special consultative status for all negotiations concerning the Kyoto Protocol.

4. The right to "development" had become synonymous with industrialization and a disregard for the land. His organization believed that development should be interpreted in a wider sense, taking into account the needs and values of individual communities. Its conception of a developed society also included elements such as the protection of the environment in which a given community lived and the maintenance of mutually beneficial relationships with other groups of people.

5. Mr. LEHCENE OMAR (International Youth and Student Movement for the United Nations) said that his organization was concerned at the deterioration in the socio-economic situation of the Saharan people under Moroccan colonial rule. Hundreds of young Saharans had been given harsh sentences by Moroccan courts for having peacefully asserted their right to share equally in the resources of their country. Several children had been sentenced to three months in a reform institution, where they had also been tortured by police, for having tattoos indicating allegiance to the Frente POLISARIO. Saharan workers were denied

basic rights such as the right to form trade unions and the right to equal pay, while their Spanish colleagues continued to enjoy such rights. The State police had been involved in the intimidation or even enforced disappearance of workers who had protested against that situation. He called on the international community to protect the Saharans from the exploitation of their resources under Moroccan rule.

6. Ms. MOTOC said that, although institutions such as the World Trade Organization (WTO) and the International Monetary Fund (IMF) might not have a specific mandate to promote human rights, they were bound to respect customary human rights law and needed to acknowledge that that was so. They also needed to appreciate how the United Nations interpreted economic, social and cultural rights, for some persons appeared to hold the view that those rights could be promoted only through economic growth.

7. Mr. YOUNES (Observer for Iraq) said, with reference to Sub-Commission resolution 2000/25 on the adverse consequences of economic sanctions, that the efforts of his Government to guarantee the economic, social and cultural rights of its people were being severely hampered by the continuing economic embargo imposed by the United Nations Security Council. Since 1990, when sanctions were first imposed, there had been over 1 million child deaths caused by conditions related to the consequent shortage of food and medicine. In May 2001 alone, there had been 5,712 infant deaths, and over 3,000 adults had died from diseases ranging from leukaemia to respiratory infections.

8. In response to the global campaign that had developed against the sanctions, the Governments of the United States of America and the United Kingdom had submitted a draft resolution containing a proposal for "smart sanctions" which, they asserted, would spare the Iraqi people the brunt of the embargo. He urged the Sub-Commission not to be deceived by that proposal, which was inconsistent with the Charter of the United Nations and with international humanitarian law.

9. Mr. SUNGAR (Observer for Turkey), speaking in exercise of the right of reply, said that the statement made at a previous meeting on behalf of the Society for Threatened Peoples contained several serious misrepresentations. Referring to the statement already made by his delegation under agenda item 2, he said that Turkey remained a democratic, secular society, in which human rights and the rule of law were fully respected. The allegations made by the speaker for the Society for Threatened Peoples might have been clouded by grievances resulting from the dissolution of the political party to which he had belonged.

10. The decision taken by the Turkish Constitutional Court to dissolve the Welfare Party had been fully endorsed by the European Court of Human Rights, which had found that the sanctions imposed could reasonably be considered to meet a pressing need for the protection of democratic society. The leadership of the Party in question had declared its intention to establish a plurality of legal systems, and to institute Islamic sharia law, which was inconsistent with the values embodied in the European Convention on Human Rights. The Virtue Party, subsequently formed by the leaders of the dissolved Welfare Party, had also been dissolved on similar grounds.

11. Mr. YOUNES (Observer for Iraq), speaking in exercise of the right of reply, said that the person who had spoken on behalf of Interfaith International belonged to a terrorist organization, responsible for rocket attacks on residential areas which had killed innocent people. The organization in question, in conjunction with foreign elements, was attempting to bring down the Government of Iraq. He urged Interfaith International not to let such individuals speak on behalf of a supposedly neutral organization, dedicated to the promotion of human rights. Indeed, if the speaker had been genuinely concerned about human rights, he should have mentioned the most recent bombing raids by United States and United Kingdom aircraft.

12. Mr. OLOKA-ONYANGO, speaking as Special Rapporteur on globalization and its impact on the full enjoyment of human rights, expressed his appreciation of all the contributions to the debate. He particularly welcomed the statements by the representatives of WTO and IMF, which had opened up new perspectives for consideration. In his view, the legal issues were of paramount importance in the discussion. There had to be a recognition of the legal obligations of multilateral institutions to respect human rights. Those institutions also had to be accountable, whether to Governments, civil society or their own membership. It had been a stimulating dialogue of a type that should be encouraged in the future.

13. Ms. UDAGAMA, speaking as Special Rapporteur on globalization and its impact on the full enjoyment of human rights, expressed her appreciation of the interactive dialogue that had taken place. It had been particularly enlightening to hear the views of the representatives of the WTO, IMF and the World Bank. She particularly welcomed the recognition that human rights were relevant to the elaboration of the rules-based system of the WTO since, to her knowledge, the WTO had previously maintained that it was concerned only with its specific mandate.

14. She accepted that the purpose of the dispute settlement mechanism was not to assess whether human rights standards had been violated but whether the WTO rules had been respected. Human rights should, nevertheless, be taken into account in developing and interpreting the rules-based regime. If human rights instruments were of relevance to the functional aspects of the regime, they must also have a bearing on the dispute settlement mechanism.

15. The Special Rapporteurs had not asserted that the dispute settlement panellists were exclusively from "first world" countries. However, there was an acute need to make the panels more representative by including panellists from the countries of the South and reflecting diverse points of view. Where developing countries were complainants or parties to a dispute, at least one panellist should be from the South. The cost to developing countries of funding panellists should also be taken into account.

16. The independence and impartiality of the panels were undermined by the fact that government representatives were admitted as members. She was pleased to hear, on the other hand, that secretariat members were not eligible. As for the panels' findings, the Special Rapporteurs were not opposed to the publication of dissenting opinions but rather to the principle of anonymity, i.e. the failure to attribute the views expressed to individual panellists. She welcomed the establishment of the Advisory Centre on WTO Law and the news that non-governmental organizations (NGOs) were to be allowed to submit amicus curiae briefs.

17. She welcomed the candid admission by the representative of IMF that structural adjustment programmes had largely failed. It was regrettable, however, that IMF continued to defend the categorical position that it was bound only by its Articles of Agreement and had no human rights obligations. The Sub-Commission was not seeking to accentuate the rift between the international economic system and human rights. It was looking for common ground and ways of blending the two regimes.

18. She agreed with the representative of the World Bank that protection of human rights presented a major challenge in operationalizing policy. It was extremely important, however, that the existence of legal obligations in that regard should be acknowledged together with the need for a legal framework.

19. Mr. JOINET said that the progress report on globalization and its impact on the full enjoyment of human rights (E/CN.4/Sub.2/2001/10) had provided material for an extremely interesting debate. He had already made preliminary arrangements for a meeting to be held in France to discuss the legal aspects of the subject, with particular reference to the applicability of international human rights instruments. He trusted that the Special Rapporteurs would be able to attend.

20. Mr. RODRIGUEZ-CUADROS said he was pleased that the report had drawn attention to the legal aspects of the impact of globalization on the enjoyment of economic and social rights. There were two additional aspects of the issue that should, perhaps, be addressed in the final report. One was the fact that States were required, under international human rights law relating to economic and social rights, to "achieve progressively" the full realization of those rights. In other words, the impossibility of full enjoyment immediately did not relieve States of their responsibility in that regard. Objective criteria for measuring the progressive attainment of those rights, for instance through action to bring down child mortality rates and provide better health-care facilities, should be established.

21. Secondly, it should be possible to measure the adverse impact on, for example, the right to employment or the right to health of targets set by international financial institutions for the reduction of budget deficits. Where the impact of austerity measures on economic and social rights was unduly harsh, developing countries should be able to negotiate more lenient terms.

PREVENTION OF DISCRIMINATION:

(a) RACISM, RACIAL DISCRIMINATION AND XENOPHOBIA

(agenda item 5) (E/CN.4/Sub.2/2001/15)

22. Mr. BOSSUYT, Special Rapporteur on the concept and practice of affirmative action, introducing his progress report (E/CN.4/Sub.2/2001/15), said he regretted that it was not yet available in all the working languages despite the fact that it had been submitted in May 2001. He thanked the 13 Governments that had responded to the questionnaire sent to all States Members of the United Nations and urged other Governments to do likewise. Unfortunately, the replies had been received too late for reflection in the report.

23. The progress report focused on the groups targeted by affirmative action, the justification for such action and the different forms it assumed. Target groups were composed of individuals who shared a characteristic, usually related to one of the grounds on which discrimination was prohibited, and who occupied a disadvantaged position in society. In many cases, a policy of affirmative action was initially adopted on behalf of a particular group and later extended to other groups, and sometimes its benefits accrued to people who had not been disadvantaged in the past.

24. The arguments used to justify affirmative action included the need to redress historical injustices, to remedy social or structural discrimination, to create diversity or proportional group representation, to achieve certain social goals, to pre-empt social unrest, to enhance the efficiency of the socio-economic system and to contribute to nation building.

25. The forms of affirmative action included affirmative mobilization, affirmative fairness and affirmative preference. In the case of mobilization, targeted groups were aggressively encouraged to apply for positions or goods of which they would otherwise be unaware. Affirmative fairness involved meticulous scrutiny to ensure that members of target groups were treated fairly. Importance was attached in that connection to effective complaint and review procedures.

26. While mobilization and fairness measures were generally well received and uncontroversial, affirmative preference measures were a different matter. They assumed two different forms. The first - less controversial - form of action consisted in giving preference to a person belonging to a designated disadvantaged group where two candidates were equally qualified. The second was far more controversial, since it involved giving preference to a disadvantaged person even if he or she was less qualified.

27. The report reviewed recent case law in that connection. He drew attention in particular to the decision by the United States Supreme Court in the Adarand Constructors v. Pena case (para. 67) and the decisions by the European Court of Justice in the Kalanke v. Freie Hansestadt Bremen case and the Marshall v. Land Nordrhein-Westfalen case (paras. 71 and 72).

28. Affirmative action should not be interpreted as justifying a distinction on any ground with respect to any right. Such measures should not benefit persons who did not need them but belonged to a group that had formerly been disadvantaged or denied to persons who needed them but belonged to a formerly well-placed group. Affirmative action policies were admissible only insofar as they complied with the principle of non-discrimination.

29. Turning to the issue of equality of opportunity versus equality of results, he said that the purpose of the former was to eliminate considerations based on, for example, race, gender or ethnicity from the decision-making process. While it promoted freedom of choice and competition between individuals, critics asserted that it often failed to improve the relative position of disadvantaged groups. The theory underlying the ideal of equality of results was that major disparities in terms of the results achieved were necessarily due to the existence of a structure of discrimination. The proposed remedy was a system of proportional representation of

groups. Critics argued that the burden of helping disadvantaged groups then fell on third parties who might be entirely without blame. His own view was that proportional representation might be a relevant factor in politics and, by extension, in some parts of the public sector.

30. While affirmative action was obviously desirable and justified in some cases, it was unclear how far it could be taken without violating the prohibition of non-discrimination. He would take due note of all the comments made by members and would reflect them in his final report to the Sub-Commission at its following session.

31. Mr. EIDE thanked Mr. Bossuyt for his very useful and well argued paper on a complex issue that would always be controversial because it reflected underlying ideological preferences, the clash between advocates of an individualistic liberal society and those who adopted a more socially oriented approach.

32. The crux of the matter was how to decide when affirmative action went beyond the establishment of a legitimate distinction and became discriminatory. It hinged, perhaps, on how one interpreted article 1, paragraph 4, and article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination. The arguments set out in paragraphs 73 to 75 of the report concerning the positive and negative consequences of different kinds of affirmative action offered considerable food for thought. The weight attached to such consequences would be strongly influenced by the context in which they occurred.

33. With regard to the justifications for affirmative action listed in chapter III, while the idea of nation building overlapped to some extent with minority rights issues, measures to assist minorities to retain their identity and to maintain social stability in a multicultural society fell into a somewhat different category. Again, different justifications might be appropriate in different societies at different times.

34. He very definitely agreed that it was necessary to strike an adequate balance between affirmative action, on the one hand, and economic and social rights, on the other. During a meeting on constitutional arrangements in South Africa, he had referred to the importance of emphasizing economic, social and cultural rights because they could be implemented in a non-discriminatory way but would have a positive affect on the problems of the population damaged by apartheid. The United States appeared to have difficulty in finding the right balance because, although it had affirmative action legislation, it was very weak in the area of economic, social and cultural rights. There appeared to be less controversy in Europe, where more attention was paid to such rights.

35. Paragraph 57 of the report mentioned that the 1997 Report on the World Social Situation maintained that Governments imposed quotas or other hard preferences without first building consensus, thereby alienating citizens who lost their right to compete on equal terms. The Special Rapporteur had then made the crucial point that it was much easier to impose quotas than to attack the underlying causes of de facto inequality between groups through a redistribution of income. With an effective, comprehensive reliance on economic, social and cultural rights, the need for extensive affirmative action might be reduced and it would lead to less controversy, at least at the individual level, although recognition of those rights involved considerable political difficulties.

36. Mr. Park, Vice-Chairperson, took the Chair.

37. Mr. KARTASHKIN said that the report was very interesting because it contained so many controversial statements; but that was only to be expected as points of view differed on each of the issues discussed. A detailed analysis would require more time than was available so he would touch on one issue only. First of all, however, with regard to paragraph 7, which contained a working definition of the concept of affirmative action, he suggested that it should be added that, in order to achieve effective equality, preference should be given to the relevant United Nations human rights regime.

38. Regarding equality of opportunities as opposed to equality of results, he was unsure which option the Special Rapporteur favoured. All individuals were born with unequal abilities. From the moment of birth, they required equality of opportunities for education, health and work, as well as all civil, political, economic, social and cultural rights; but that was the limit to equality of opportunities. Not everyone could be a Nobel Prize laureate; consequently, it was necessary to support the concept of equality of opportunities but not that of equality of results, since it was impossible to achieve the latter without introducing discrimination. People were born with different abilities and different inclinations and that should be expressed more clearly in the report.

39. Mrs. WARZAZI said that, while welcoming the report, she had certain reservations about it and would have preferred it to have given more attention to women. It would have been useful if the report had contained more background information on where and when what she preferred to call "positive discrimination" was first instituted. Sweden was possibly the first country that had opted to use it, as a political gesture, and it had produced excellent results, particularly for women. Other countries had followed Sweden's example, above all in the public sphere. It would have been interesting to have included a list of the countries that had introduced such measures in favour of women - her own special interest - together with their evaluation of the scope and concrete results; for example, women currently occupied 50 per cent of the positions in the Government and Parliament of Sweden.

40. The report could also have referred to all the international instruments that contained articles recommending Governments to take special steps to remedy situations of discrimination in order to bring equality to all sectors of society, particularly the disadvantaged. And, as in the case of the international instruments, it should emphasize the fact that the measures must cease once the desired results had been achieved.

41. There had been considerable discussion on whether it was acceptable for Governments to promote positive discrimination policies. For example, whenever a measure was adopted in favour of women in Morocco, it was said to be discriminatory. In fact, such discrimination was designed to improve the previous discriminatory situation of women - it was thus positive discrimination, which was why she preferred that term. It was a primary requirement that Governments should be obliged to grant women and girl children access to education. Once women were educated, they were better able to defend their rights themselves and that led to less discrimination.

42. A few years previously, the Inter-Parliamentary Union had made a study of the situation of women in the political and parliamentary sphere which had concluded that there were three types of positive discrimination policies. The first type comprised regulations concerning education, employment and other areas; that had been attempted in the United States, but there had been strong opposition; the second type comprised obligatory quota systems that had to be adopted by political parties in order to ensure that women were placed in decision-making positions where they could influence the situation of other women; and the third type was the designation by the Head of State of a list of women eligible for public positions. That third type had produced excellent results in Morocco.

43. Mr. YIMER said that affirmative action was a complex issue, because it was a very controversial subject. Nevertheless, the report had managed to bring out all the issues involved although, as it advanced, it entered increasingly complex terrain.

44. He agreed with the focus of the report, as set out in paragraph 5. The conceptual framework in chapter I discussed the terms affirmative action and positive discrimination and stressed that the term "positive discrimination" was a contradiction in terms. It was preferable, therefore, to refer to affirmative action.

45. Paragraph 19 spoke of the importance of adopting a more individualized approach towards affirmative action, awarding opportunities to an individual on the basis of individual needs, rather than purely on the basis of group membership, and he wondered whether that was how affirmative action was currently understood.

46. There was perhaps some overlap among the seven justifications for affirmative action mentioned in the report. While agreeing with the first two: to remedy or redress historical injustices and to remedy social/structural discrimination, he believed that the other justifications were either included within those two or were questionable.

47. The report referred to various forms of affirmative action such as affirmative mobilization, affirmative fairness, and affirmative preference. It was difficult to see, however, what they added to the general concept. They tended rather to confuse the issue and, for example, the meaning of paragraphs 51 and 52 was unclear to him.

48. Paragraphs 73 and 74 were the most difficult part of the report as they referred to the relationship between affirmative action and non-discrimination. Paragraph 75 stated that affirmative action policies were admissible only insofar as they did not contravene the principle of non-discrimination. He was not sure when affirmative action became discrimination and questioned whether affirmative action was mandatory.

49. Once the report started to discuss equality of opportunities versus equality of results it departed from the issue of affirmative action, since they were totally different concepts. Affirmative action had been introduced because equality of opportunities was insufficient. Lastly, he wished to stress the importance of paragraph 94, which stated that the method by which people's situations were improved was of great importance in terms of whether such efforts had the support or the opposition of others, and that affirmative action was no substitute for anti-poverty programmes.

50. Mrs. DAES said that the report was a very useful one as it could be used by national executive and juridical authorities and by the competent organs and bodies of the United Nations system.

51. The Special Rapporteur might wish, however, to elaborate further in his final report on the particularly complex issue of over- and under-inclusiveness dealt with in chapter II on target groups.

52. She suggest that the report should be sent to Governments, the specialized agencies and the relevant NGOs for their comments, together with the questionnaire on affirmative action contained in annex 1.

53. Ms. TERAO said she would like to outline some of the background to the development of affirmative action in the United States, which was covered at some length in the report. It was true that recent decisions by the United States Supreme Court indicated that its current position was that any differential treatment based on race would henceforth be subjected to strict scrutiny. The notion of affirmative action had arisen in the United States due to the system of racial segregation that had existed for many years in the field of education. In a famous ruling in 1954, the Supreme Court had held that such segregation was unconstitutional and it had been officially abolished. In fact, however, only a very few black students had applied to enter white schools, and no white students had applied to enter black schools; the idea of affirmative action had thus developed as a way of giving black children equal opportunities in practice. That, in turn, had led to the civil rights movement, and eventually to the admission of coloured people to higher education and to the professions.

54. One of the effects of the movement had been the recognition of the right of protesters arrested for civil disobedience to be represented by lawyers. Affirmative action had thus played an important role in the development of human rights in the United States, despite the fact that human rights in that country tended to be viewed in an individual rather than in a group context. Although affirmative action still occurred in many fields there, it was unclear whether it would be able to continue, owing to the risk of litigation by opposing interests.

55. Mr. GOONESEKERE said he had been impressed by Mr. Bossuyt's study, which had highlighted the various ways in which affirmative action manifested itself in different countries. Some countries operated a system of quotas favouring disadvantaged groups. Others, such as Nigeria, operated quotas giving shares of government employment to citizens of the various states of the Federation. A similar system operated in Malaysia. Although the quota system was criticized by some as inequitable, it could be justified on political grounds in that it offered opportunities to undeveloped or marginalized groups or communities. It might well be undesirable, however, to continue to pursue policies of affirmative action once the reasons for them no longer existed, or when there was a backlash from other groups also suffering from a lack of opportunities.

56. While most affirmative action programmes were targeted at the public sector, they should also address the private sector, in which positive steps needed to be taken to counter discrimination based on ethnicity, gender or religion.

57. Mr. Weissbrodt resumed the Chair.

58. Mr. JOINET said the subject treated in the report was one of the most difficult the Sub-Commission had had to address. He regarded it essentially as a discussion paper, designed to enable the various issues involved to be addressed in a dispassionate way. One of the most difficult of those issues was who was to decide, and on what criteria, which groups were the most disadvantaged.

59. The report gave a number of examples of affirmative action relating to France, notably the quota policy whereby both the Government and private firms were required by law to take on a certain quota of disabled persons. That policy had become generally accepted, although it had given rise to a number of problems, notably that of the cost of adapting premises.

60. Another difficult question was what was to be done once the concerns which had given rise to the action had been met. Affirmative action could have the effect of permanently altering public attitudes, as had occurred, for instance, when De Gaulle had decided at the time of the liberation that women should be given the vote. Similarly, the recognition of the principle of parity between men and women in the electoral system had had an important effect in the political sphere, in that a party whose list of candidates did not respect the principle of parity would not be legally entitled to financial support. A further effect of recognition of that principle had been to ensure that fresh candidates came forward regularly as others left so that the gender balance could be ensured.

61. Mr. PARK said that the practice of affirmative action was an indispensable part of human rights protection, and should be considered mandatory for States in the fulfilment of their obligations under the international human rights instruments.

62. However, he was concerned that, if preferential treatment was given to one vulnerable sector of the population at the expense of others, some of the fundamental objectives of affirmative action, such as the prevention of social unrest and the creation of national unity, might be jeopardized. Affirmative action should be addressed in the context of international human rights law, although it was not easy to identify which specific human rights forum would be the most appropriate for dealing with the subject.

63. Lastly, with regard to the question of duration, he believed that affirmative action should last long enough to ensure that the negative effects of past wrongs and current injustices had been remedied.

64. Mr. BOSSUYT, Special Rapporteur on the concept and practice of affirmative action, thanked the members of the Sub-Commission for their comments. He noted that they were all agreed that the subject was a difficult and complex one.

65. In response to Mr. Eide, he agreed that the key issue was when a measure labelled as affirmative action could be considered to be discriminatory. It was also important to take into account the context of such an action in terms of time and place. He pointed out that the justifications listed in the report were not his own, but were simply those that had been put

forward by others. He agreed that affirmative action programmes could not be a substitute for anti-poverty programmes or for sound economic and social policy. In reply to Mr. Kartashkin, he said that, as a matter of fact, he had more sympathy with equality of opportunity than with equality of results.

66. Mrs. Warzazi had rightly pointed out that the study was not limited to affirmative action in the area of race, but covered other areas, such as that of gender equality. On the matter of terminology, his own view was that, since discrimination was prohibited in all human rights instruments, there was no sense in which it could be regarded as positive. There was need to be clear on that point, which might give rise to confusion.

67. He should, perhaps, have made more of an effort to list the practices prevailing in different States, but for that he would have needed the cooperation of Governments, and the replies received to the questionnaire had hitherto been few in number.

68. In reply to the question asked concerning justification on the grounds of diversity, he referred to the reasoning of Justice Powell in the Bakke case of 1978 that a diverse student body could be an asset to a university. That reasoning had resulted in the upholding of the measures taken by the University of California at the time. As he saw it, there was an important difference between, on the one hand, affirmative mobilization and affirmative fairness and, on the other, affirmative preference: the first two favoured the position of a certain disadvantaged group without depriving anyone else of any particular right. Even affirmative preference did not give rise to problems as long as the preference was given to a person who was equally qualified. He agreed that measures should be taken to ensure equality of opportunity to the extent that certain groups should be brought to a level at which they were able to compete.

69. In response to the point made by Mr. Goonesekere, he said he believed that a distinction should be made between the public and private sector: certain measures that were justifiable for the former might not be appropriate for the latter. He agreed with Mr. Park and Mr. Joinet that one of the purposes of the study was to increase awareness of the issue and provoke discussion.

70. In reply to a question from Mrs. Warzazi, he said the report would be distributed to the members of the Committee on the Elimination of Racial Discrimination as soon as it became available in the various languages. Lastly, concerning the issue of terminology, he confirmed that the English formulation "affirmative action" was normally rendered in French as "action positive".

The meeting rose at 1 p.m.